(1) (3)

Nos. 88-1872, 88-2074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CYNTHIA RUTAN, *et al.*,
Petitioners,

v.

REPUBLICAN PARTY OF ILLINOIS, *et al.*,
Respondents,

and

MARK FRECH, *et al.*,
Cross-Petitioners,

v.

CYNTHIA RUTAN, *et al.*,
Cross-Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' AND CROSS-RESPONDENTS' BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Is it constitutional to deny a public employee a promotion due to his or her political beliefs or his or her party affiliation?
2. Is it constitutional to deny a public employee a transfer due to his or her political beliefs or his or her party affiliation?
3. Is it constitutional to deny a qualified applicant an opportunity for public employment due to his or her political beliefs or his or her party affiliation?
4. Is it constitutional to condition promotion or transfer of public employees upon political support of, or financial contribution to, a favored political party or candidate?
5. Is it constitutional to condition obtaining public employment itself upon political support of, or financial contribution to, a favored political party or candidate?

LIST OF PARTIES

The parties to the proceedings before this Court are:

Petitioners/Cross-Respondents:
CYNTHIA RUTAN, FRANKLIN TAYLOR, individually and in behalf of state employees under the jurisdiction of the Governor desiring promotions and transfer, DAN O'BRIEN and RICKY STANDEFER, individually and in behalf of persons laid off and not rehired by agencies under the jurisdiction of the Governor.[1,2]

Petitioner:
JAMES MOORE, individually and in behalf of persons desiring employment in agencies under the jurisdiction of the Governor and potential state employees denied benefits and persons denied employment.[2]

Respondents/Cross-Petitioners:
THE REPUBLICAN PARTY OF ILLINOIS and EACH COUNTY OF ILLINOIS by DON W. ADAMS and IRVIN SMITH, individually and as representatives of all Republican State Central Committee and County Central Committee members;

[1] Cross-Respondents Standefer and O'Brien in this case claimed they were not recalled to state employment after lay-off due to their political affiliation. The Seventh Circuit reversed the dismissal of their claims holding the claims were political discharge cases falling under *Elrod v. Burns*, 427 U.S. 347 (1976). Cross-Respondents Standefer and O'Brien did not seek review of the Seventh Circuit's ruling as to them, but they are before this Court because this Court has granted the Cross Petition for Writ of Certiorari.

[2] The District Court failed to consider whether the petitioners may properly present this case as a class action. The Seventh Circuit Court of Appeals held this did not deprive that court of jurisdiction and proceeded to consider the claims presented by petitioners and cross-respondents. (A. 7).

JAMES THOMPSON, individually and as Governor of the State of Illinois;

MARK FRECH, GREG BAISE, WILLIAM FLEISCHLI, RANDY HAWKINS, KEVIN WRIGHT, JAMES REILLY, LYNN QUIGLEY, individually and in their official capacities;

GREG BAISE, as representative of all Directors, Heads or Chief Executive Officers, since February 1, 1981, of State of Illinois Departments, Boards, and Commissions under the jurisdiction of the Governor; and

LYNN QUIGLEY, as representative of all liaisons since February 1, 1981, between the Governor's Office of Personnel and State of Illinois Departments, Boards and Commissions under the jurisdiction of the Governor.

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OPINIONS BELOW

The initial opinion of the Court of Appeals for the Seventh Circuit is reported at 848 F.2d 1396 (7th Cir. 1988) and is reprinted in the appendix to the Petition for Certiorari, p. A-1. The opinion issued *en banc* is reported

at 868 F.2d 943 (7th Cir. 1989) and is reprinted in the appendix to the Petition for Certiorari, p. B-1.

The decision and opinion of the United States District Court for the Central District of Illinois is reported at 641 F.Supp. 249 (C.D. Ill. 1986) and is reprinted in the appendix to the Petition for Writ of Certiorari, p. C-1.

JURISDICTION

This cause arose under 42 *United States Code* 1983, 1985. The United States District Court for the Central District of Illinois had jurisdiction under 28 *United States Code* 1331, 1343. On July 11, 1986, the District Court granted Respondents' motion to dismiss.

The Court of Appeals for the Seventh Circuit had jurisdiction of this cause under 28 *United States Code* 1291. On June 8, 1988, the Court of Appeals held the denial of Petitioners Rutan and Taylor's promotions and transfer due to their political affiliation was not unconstitutional unless the denials constituted constructive discharge. Judge Ripple dissented.

The Court remanded the claims of Cross-Respondents Standefer and O'Brien that they had not been recalled to employment to see if their situations constituted coercion as prohibited by *Elrod v. Burns*, 427 U.S. 347 (1976).

The Court held the denial of an opportunity for employment due to Petitioner Moore's political affiliation was constitutional. Judge Ripple dissented.

On August 17, 1988, the Court of Appeals granted Petitioners' and Cross-Respondents' suggestion for rehearing *en banc*.

On February 16, 1989, the Court of Appeals sitting *en banc* (Judges Wood and Flaum not participating) entered a judgment and opinion substantially the same as the initial opinion. Judge Ripple again dissented, joined by Judge Cudahy, as to the holding regarding Petitioners Rutan and Taylor's claims. Judge Ripple further dissented from the affirmation of the dismissal of Petitioner Moore's claim.

This Court has jurisdiction to review this case under 28 *United States Code* 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment
To The United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment
To The United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

42 *United States Code* 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 *United States Code* 1985

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or

of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Illinois Revised Statutes, Ch. 127, Sec. 63b102

63b102. Purpose

Sec. 2. Purpose. The purpose of the Personnel Code is to establish for the government of the State of Illinois a system of personnel administration under the Governor, based on merit principles and scientific methods.

STATEMENT OF THE CASE

This case was decided on a motion to dismiss. When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), all well-pleaded allegations of the complaint are deemed admitted with every reasonable doubt resolved in favor of the pleader. See *Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969). (The Complaint filed in this matter is to be found in the Appendix to Respondent's Response to Petition for Certiorari, hereinafter referred to as R.A.)

This litigation was brought by five individuals who have been denied important aspects of employment due to their political beliefs and political associations. They have not supported the Republican Party or its candidates.

All positions in question, with the exception of that held by Ricky Standefer, fall under the civil service provisions of the Personnel Code of the State of Illinois. *Ill. Rev. Stat.*, ch. 127, sec. 63b101.

Cynthia Rutan has worked for the Department of Rehabilitation Services of the State of Illinois since 1974. (Disability Claims Specialist). She has repeatedly applied for promotion, but has been denied those promotions because of her political affiliation. She is qualified for the positions she sought. Those promotions have been given to persons less qualified than Cynthia Rutan. Cynthia Rutan has not supported the Republican Party or its candidates, but those persons put in the positions for which she applied have supported the Republican Party. Otherwise, she would have been promoted. (R.A., pp. 13-14).

When Cynthia Rutan was advised about the way this system operated, she went to the Sangamon County Republican Central Committee and obtained the promotion form which reads:

SANGAMON COUNTY REPUBLICAN CENTRAL COMMITTEE
200 SOUTH SECOND STREET, SPRINGFIELD, IL 62701

PRINT OR TYPE
NAME_____DATE_____

ADDRESS_____ PRECINCT_____ TOWNSHIP_____

TELEPHONE_____

VOTING ADDRESS IF DIFFERENT_____ PRECINCT_____

AGE___ DATE OF BIRTH_____ SOCIAL SECURITY #_____

PRESENT POSITION_____ DEP'T_____

DESIRED POSITION_____ DEP'T_____

HOW LONG IN PRESENT POSITION_____

REASON FOR CHANGE_____ ARE YOU QUALIFIED?___

GIVE NAME OF TEST TAKEN_____ GRADE_____ DATE_____

FOR WHICH PARTY DID YOU VOTE IN PRIMARY ELECTIONS?
1984_____1982_____1980_____1978_____

NOTE: (if under age, question applies to parents.)
Enter name here:_____

DO YOU HOLD A MEMBERSHIP IN THE LINCOLN CLUB OF SANGAMON COUNTY? _____

WOULD YOU BE WILLING TO BECOME AN ACTIVE SANGAMON COUNTY REPUBLICAN FOUNDATION MEMBER? _____ (The foundation is a voluntary, financial assistance organization)

WOULD YOU BE WILLING TO CANVASS AND WORK YOUR PRECINCT OR NEIGHBORHOOD FOR CANDIDATES THE CENTRAL COMMITTEE RECOMMENDS AS QUALIFIED FOR LOCAL, STATE, AND NATIONAL OFFICES? _____

I AFFIRM THAT THE INFORMATION GIVEN ON THIS APPLICATION HAS BEEN ANSWERED HONESTLY TO THE BEST OF MY ABILITY.

_____
Signature of Applicant

I RECOMMEND THE ABOVE APPLICANT BECAUSE _____

_____

_____
Signature of Precinct Committeeman

(R.A., pp. 14, 24).

Franklin Taylor has worked for the Illinois Department of Transportation as an equipment operator since 1969. In July of 1983, he applied for a vacant lead worker position which would have been a promotion for him. He was denied that promotion due to his political affiliation. Medford Phillips was promoted to that vacancy. He was less qualified and had less seniority than Franklin Taylor, but Phillips had the sponsorship of the Fulton County Republican Party for that promotion. Franklin Taylor did not have that sponsorship. (R.A., pp. 14-15).

Franklin Taylor also sought a geographical transfer from Fulton County to Schuyler County, the county in which he resides. He was denied that transfer due to his political affiliation. The transfer would have placed his work site much closer to home. He was denied that transfer because the Republican County Chairmen in those two counties would not approve it. (R.A., p. 15).

Ricky Standefer was hired in a temporary position at the Illinois State Garage on May 12, 1984. In November of that year, Ricky Standefer and five other temporary employees at that Garage were laid-off. The five other employees were offered other jobs with the State because they had the sponsorship of the Republican Party. Ricky Standefer was not offered another job due to his political affiliation. He had voted in the Democratic primary. (R.A., p. 15).

Dan O'Brien began to work for the State of Illinois as a dishwasher at the Lincoln Development Center of the Department of Mental Health and Developmental Disabilities on April 1, 1971. Over the years, he continued to work at the Center and was promoted. On April 5, 1983, he was laid off; at that time he was a Dietary Manager I. (R.A., pp. 15-16).

Under the Personnel Rules adopted pursuant to the Illinois Personnel Code, Dan O'Brien could have been recalled within two years of that lay off. Had he been recalled, he would not have lost any seniority or other employment benefits. (R.A., p. 16).

In December of 1984, Chuck Cicci, business administrator for the Lincoln Developmental Center, told Dan O'Brien he was going to be recalled to work as soon as his recall was approved by the Governor's Office of Personnel. In February of 1985, Superintendent Johnson, head of the Lincoln Developmental Center, told O'Brien the Governor's Office of Personnel had denied his recall from lay-off. (R.A., p. 16). He was denied that recall due to his political affiliation.

Dan O'Brien had voted in the Democratic primary election. (R.A., p. 16).

Armed with the knowledge of how the system operates, he then worked to gain the support of Joe Sapp, the Logan County Republican Chairman. Soon after receiving Sapp's support, he was hired by the Department of Corrections. However, he lost 12 years of seniority and he received less salary than he would have earned had the Governor's Office of Personnel not rejected his recall from layoff as a Dietary Manager I. (R.A., p. 16).

James Moore was honorably discharged from the United States Army in 1958 and, thus, qualifies for veteran status in seeking employment with the State of Illinois. Since 1978 he has repeatedly sought employment with the State, particularly for available positions within the Department of Corrections, but has been denied all positions due to his political affiliation. When Petitioner Moore approached his State Representative who was a Republican about getting a job, he received the following letter:

(Letterhead Of)

GENERAL ASSEMBLY
STATE OF ILLINOIS
ROBERT C. WINCHESTER
STATE REPRESENTATIVE – 59th DISTRICT

James W. Moore, Sr. August 15, 1980
Route 3, Box 278
Golconda, Illinois 62938

Dear Mr. Moore:

In response to your July letter requesting employment with the State of Illinois, please be advised that there are over 1,100 applications on file at the Vienna Correctional Center. Of those, 450 have been strongly recommended by the precinct committeemen within the Republican organization. This represents requests for employment from the 12 counties in the 59th legislative district. . . .

. . .

I would suggest that you make contact with your precinct committeeman and your Republican County Chairman. You will have to receive the endorsement of the Republican Party in Pope County before I can refer your name to the Governor's office.

Sincerely,

/s/ Bob
Robert C. "Bob" Winchester
State Representative

RCW/jam

James Moore could not obtain the Republican County Chairman's signature due to his political affiliation. Jobs for which he had applied, and for which he was qualified, were filled with persons less qualified, but who were affiliated with the favored political party. (R.A., pp. 16-17, 25-26).

The system that denied the Petitioners and Cross-Respondents these important aspects of employment is relatively simple. There are more than 60,000 persons employed in the fifty departments, boards and commissions under the jurisdiction of the Governor of Illinois. Each year more than 5,000 of those positions are filled by promotion, transfer or hiring as a result of resignations, deaths, retirements, expansion of job positions, changes in job classifications and reorganizations. (R.A., p. 6).

On November 12, 1980, Respondent Thompson issued an Executive Order which formalized the employment system of his administration. (R.A., p. 6). It reads:

(Letterhead Of)

STATE OF [Seal] ILLINOIS
EXECUTIVE DEPARTMENT
SPRINGFIELD, ILLINOIS

EXECUTIVE ORDER Number 5 — (1980)

HIRING FREEZE

Effective at the close of business today, November 12, 1980, no agency, department, bureau, board or commission subject to the control or direction of the Governor shall hire any employee, fill any vacancy, create any new position or take any other action which will result in increases, or the maintenance of present levels, in State employment, including personal service contracts. All hiring is frozen. There will be no exceptions to this order without my express permission after submission of appropriate requests to my office. (R.A., p. 23).

Thereafter, Respondent Thompson delegated to employees in his office the power to implement this Order. Those employees came to be known as the "Governor's Office of Personnel." Actual implementation of that Order means that no position can be filled, either by promotion, transfer, recall from lay-off or hire, without the permission of

that office. The decision to fill a particular position is based upon political factors, namely, the contribution of money to the Republican Party and the support of that party and its candidates. Those who are politically favored are promoted, transferred, recalled from layoff or hired. Those who are not so favored are not promoted, transferred, recalled from layoff or hired.

The Governor's Office of Personnel uses employees in each department, known as liaisons, to keep the Office advised as to positions available or about to be made available. The liaison also facilitates the actual promotion, transfer, recall from lay-off or hire of those approved by the Governor's Office of Personnel. (R.A., p. 8).

In deciding whether to fill a particular position with a particular person, the Governor's Office of Personnel reviews the person's primary voting record, the support that person has given to Republican candidates and the financial contributions made by that person to the Republican Party and Republican candidates. The voting records of relatives, their support of candidates and their financial contributions also play a role in determining whether the person will be given a position. (R.A., p. 7).

In making the review, the Office uses the local county Republican Party organizations (there are 102 counties in Illinois). The form obtained by Petitioner Rutan, reprinted *supra*, is used by the local county organizations. After review and verification of the information on the form, the county Republican Party organizations decide whether to forward a recommendation supporting the person to the Governor's Office of Personnel. (R.A., p. 7).

If the home county organization does not recommend the person, nothing is forwarded to the Governor's Office. Once a recommendation is received by the Governor's Office of Personnel, that Office then decides whether the

person will be promoted, transferred, recalled from lay-off or hired.

The cost of operating this system of employment is two million dollars of taxpayers money—money paid by Independents, Democrats and Republicans not of the same political persuasion as the incumbent administration, as well as, by supporters of that administration. (R.A., pp. 12, 20). While this tax money is collected in a non-partisan fashion, the system it supports is designed to interfere with the free functioning of the electoral process. (R.A., p. 18).

The Plaintiffs are direct victims of this employment system.

The District Court dismissed all claims.

The Seventh Circuit, *en banc*, remanded the claims of Ricky Standefer and Dan O'Brien for a determination on the facts as to whether their situations were of the type considered inherently coercive and violative of the First Amendment in *Branti v. Finkel*, 445 U.S. 507 (1980) and *Elrod v. Burns*, 427 U.S. 347 (1976). Ricky Standefer and Dan O'Brien did not join in the Petition for Certiorari, but are before this Court on the granting of the Cross Petition for Certiorari.

The Seventh Circuit held that the other employment actions were constitutional unless they constituted constructive discharge. The Court further held the federal courts were not open to James Moore's claim, thus, giving *de facto* constitutional protection to all systems of hiring based upon political beliefs and affiliation.

Judges Ripple and Cudahy dissented as to the standard of constructive discharge imposed on the Rutan and Taylor claims. Judge Ripple further dissented as to Moore's claim urging the matter be remanded for development of the factual record as to the particular employment system in this case.

SUMMARY OF ARGUMENT

Petitioners and Cross-Respondents were denied important aspects of employment due to their political beliefs and political affiliations. By Executive Order and implementation of an employment system, the Respondents have done what could not be done by statute: namely, limit promotions, transfers, recalls from lay-off and employment itself to those who are politically favored. The inherent unconstitutionality of the system is apparent, for the Respondents could not post a vacant position listing as a qualification a $500.00 contribution to a particular political party or a particular political candidate. But, *sub silencio*, that is what has happened in Illinois.

Petitioners and Cross-Respondents have not supported the Republican Party and its candidates either by financial "contributions" or "volunteer" work. Nor have they voted in the Republican primary. Just as Petitioners and Cross-Respondents have the right to support political candidates and associate with a political party, Petitioners and Cross-Respondents also have the right under the First Amendment to the United States Constitution not to support a particular political party or its candidates and the right to refrain from voting in a particular party primary.

As a result of the exercise of those First Amendment rights, Respondents denied Petitioners Rutan and Taylor promotions, Petitioner Taylor a transfer, Cross-Respondents Standefer and O'Brien recall from lay-off, and Petitioner Moore a job itself. These acts are coercive in nature and directly interfere with Petitioners' and Cross-Respondents' First Amendment rights.

When First Amendment rights are at stake, this Court has not drawn any distinction between an employee's rights and an applicant's rights.

There is no overriding or vital state interest that justifies this interference with Petitioners' and Cross-Respondents' First Amendment rights. Allowing the incumbent administration to appoint its policy makers, who have the ability to discharge subordinates if they do not carry out the policy, insures effective and efficient government. In fact, the interest of the state would have been better served by the granting of the benefits these Petitioners and Cross-Respondents sought, for Petitioners and Cross-Respondents were more qualified than the politically favored persons who received the benefits.

The employment system in this case does not strengthen the two party system, but rather is intended to strengthen one party by coercing persons to vote in that party's primary, not out of choice, to contribute money to candidates whose views they do not support, and to work for a political party with whom they do not wish to associate. But that is the price that must be paid if those persons are to be promoted, transferred, recalled from lay-off or hired.

This Court should not relegate First Amendment rights in the employment context to a position inferior to other constitutional rights, particularly employment rights guaranteed by the Fourteenth Amendment to the United States Constitution.

The employment system at issue in this case means that Democrats, Independents and Republicans holding political views different from the incumbent administration need not apply for promotion, transfer, recall from lay-off or hire, for they simply will not receive those benefits of employment. That violates the First Amendment right of freedom of association.

ARGUMENT

I. Introduction.

In *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947), this Court recognized:

> that Congress may not enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office or that no federal employee shall attend Mass or take any active part in missionary work.

This Court applied that principle to state legislatures in *Wieman v. Updegraff*, 344 U.S. 183 (1952). The Illinois General Assembly could not constitutionally enact a law providing that no Democrats or Independents or Republicans with political views differing from the incumbent administration shall be employed, promoted or transferred by the state or a law providing that only those favored by the Republican Party could be employed, promoted or transferred by the State.

But that is exactly what has happened by Executive Order and implementation of an employment system that limits jobs, promotions, recall from lay-off and transfers to those politically favored by the incumbent admininstration. What the state could not do lawfully by statute the state has done indirectly by Executive Order and practice. Regardless of the method, the impact on First Amendment rights is the same. Both are unconstitutional.

In *Elrod v. Burns*, 427 U.S. 347 (1976), this Court said:

> . . . The denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly. 427 U.S. at 361.

At the outset, Petitioners and Cross-Respondents recognize that an incumbent administration should have the ability to fire and hire policy makers of their political persuasion where political affiliation is a legitimate factor to be considered. *Branti v. Finkel*, 445 U.S. 507 (1980). The Petitioners and Cross-Respondents simply do not fall into that category.

II. Traditional Analysis Of First Amendment Public Employment Cases.

In those cases raising First Amendment issues, this Court has repeatedly used the following analysis:

1. All persons have the right to freedom of speech and freedom of association as guaranteed by the First Amendment of the United States Constitution.

2. If the state is to interfere with those First Amendment rights it must have a compelling or overriding state interest.

3. If the state has such an interest, the interference with the right must be clearly defined in the least restrictive terms possible. *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Eu v. San Francisco County Democratic Central Committee*, ____ U.S. ____, 109 S.Ct. 1013 (1989).

> In short, if conditioning the retention of public employment on the employee's support of the in-party is to survive constitutional challenge, it must further some vital government interest by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights. *Elrod v. Burns*, 427 U.S. 347, 363 (1976).

Throughout this litigation, the Petitioners and Cross-Respondents have framed their position and argument

within this traditional analysis, but Respondents have failed to do so.

III. The Conduct Of The Petitioners And Cross-Respondents Is Protected By The First Amendment To The United States Constitution.

Long ago this Court recognized that public employees, just as private citizens, enjoy the First Amendment rights of freedom of speech and freedom of association. *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977); *Rankin v. McPherson*, 483 U.S. 387 (1987).

Basic to the exercise of First Amendment rights is the right to support a particular political party which espouses particular ideas and the right to support particular candidates for public office. *Elrod v. Burns*, 427 U.S. 347 (1976); *Illinois State Employees Union, Council 34, Etc. v. Lewis*, 473 F.2d 561 (7th Cir. 1972); *Tashjian v. Republican Party of Connecticut*, 477 U.S. 208 (1986); *Eu v. San Francisco County Democratic Central Committee*, ___ U.S. ___, 109 S.Ct. 1013 (1989). Such association is fundamental to our democratic way of life.

This Court has also recognized the right protected by the First Amendment to refrain from supporting a particular party or candidate. The holdings in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) and *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), make it abundantly clear that silence or not supporting a particular party or candidate is protected by the First Amendment.

In striking down that provision of an agency shop agreement which required a teacher to contribute support to an ideological cause he might oppose, this Court in *Abood* after citing *Buckley v. Valeo*, 424 U.S. 1 (1976), said:

> The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. *For at the heart of the First Amendment is the notice that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.* See *Elrod v. Burns, supra*, 427 U.S. at 356 357, 95 S.Ct. at 2681-82; *Stanley v. Georgia*, 394 U.S. 557, 565, 89 S.Ct. 1243, 1248, 22 L.Ed.2d 542; *Cantwell v. Connecticut*, 310 U.S. 296, 303-304, 60 S.Ct. 900, 903, 84 L.Ed. 1213. And the freedom of belief is no incidental or secondary aspect of the First Amendment's protections:
>
> > "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by work or act their faith therein." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628. 431 U.S. at 234-35.
>
> (emphasis added).

The Petitioners and Cross-Respondents were denied important aspects of employment due to their political beliefs and association.

The Respondents have never contested the fact that the conduct of the Plaintiffs falls within the protection of the First Amendment to the United States Constitution.

IV. The Denial Of Promotion, Transfer, Recall From Lay-Off And Employment Itself Interferes With Petitioners' And Cross-Respondents' First Amendment Rights.

A. Public Employees

Because the actions of the Respondents implicate the First Amendment rights of the Petitioners and Cross-Respondents, the standard of review is one of exacting scrutiny. *Elrod v. Burns*, 427 U.S. 347 (1976); *Eu v. San Francisco Democratic Central Committee*, ____ U.S. ____, 109 S.Ct. 1013 (1989).

In *Elrod*, this Court (plurality opinion) rejected beginning the analysis of the patronage system with the judgment of history or the actual operation of the practice but rather held the inquiry began with identification of the constitutional limitations imposed by the system and said:

> The cost of the practice of patronage is the restraint it places on freedoms of belief and association. In order to maintain their jobs, respondents were required to pledge their political allegiance to the Democratic Party, work for the election of other candidates of the Democratic Party, contribute a portion of their wages to the Party, or obtain the sponsorship of a member of the Party, usually at the price of one of the first three alternatives. Regardless of the incumbent party's identity, Democratic or otherwise, the consequences for association and belief are the same. An individual who is a member of the out-party maintains affiliation with his own party at the risk of losing his job. He works for the election of his party's candidates and espouses its policies at the same risk. The financial and campaign assistance that he is induced to provide to another party furthers the advancement of that party's policies to the detriment of his party's views and ultimately his own beliefs, and any assessment of his salary is tantamount to coerced belief. See *Buckley v. Valeo*, 424 U.S. 1, 19, 96 S.Ct. 612, 634-635, 46 L.Ed.2d 659 (1976). *Even a pledge of allegiance to another party, however ostensible, only serves to compromise the individual's true beliefs. Since the average public employee is hardly in the financial position to support his party and another, or to lend his time to two parties, the individual's ability to act according to his beliefs and to associate with others of his political persuasion is constrained, and support for his party is diminished.* 427 U.S. at 355-356. (emphasis added).

Those limitations are no different in the instant case. Simply change the words "maintain their jobs" to "obtain a promotion, transfer, recall from lay-off or a job itself." The effect on the individual is the same. People often compromise to obtain what they want, but compromise is not possible in this case. Not only must the Petitioners and Cross-Respondents reject or abandon their beliefs, but they must support that in which they do not believe in order to obtain a promotion, transfer, recall from lay-off or employment. They must vote in the favored party's primary, not by choice. They must work for the election of candidates whose views they do not accept. They must contribute money to support a party with whom they do not wish to associate.

> Patronage, therefore to the extent it compels or restrains belief and association, is inimical to the process which undergirds our system of government and is "at war with the deeper traditions of democracy embodied in the First Amendment." *Illinois State Employees Union v. Lewis, supra*, at 576. As such, the practice unavoidably confronts decisions by this Court either invalidating or recognizing as invalid government action that inhibits belief of public employment on political faith. *Elrod v. Burns*, 427 U.S. at 357.

In *Branti v. Finkel*, 445 U.S. 507 (1980), the petitioner argued that the respondents were not subjected to political coercion, that those employees being displaced simply did not have proper political sponsorship. This Court rejected that argument saying:

> While it would perhaps eliminate the more blatant forms of coercion described in *Elrod, it would not eliminate the coercion of belief* that necessarily flows from the knowledge that one must have a sponsor in the dominant party in order to retain one's job. More importantly, petitioner's interpretation would require the Court to repudiate entirely the conclusion of both Mr. Justice BRENNAN and Mr. Justice STEWART that the First Amendment prohibits the dismissal of a public employee solely because of his private political beliefs. 445 U.S. at 516-517. (emphasis added)

In this case, not only is the sponsorship required, the blatant forms of coercion are also present. The coercion in this case is no less than in *Elrod*.

The Respondents have taken the position throughout this litigation that denial of promotion, transfer, recall from lay-off and a job itself does not rise to the level of a constitutional violation.

The Seventh Circuit recognized that failure to transfer or promote *was coercive* but found it "significantly less coercive or disruptive than discharging an employee" (A-25).

In the Seventh Circuit, there are now degrees of coercion or disruption under the First Amendment—some constitutional and some not. Prior to its decision in this case, the Seventh Circuit had an outstanding record in protecting public employees' First Amendment rights.[3] The Seventh Circuit decision in this case is, indeed, an aberration.

The Seventh Circuit's approach amounts to distinction without meaning and emasculates this Court's holdings in *Elrod v. Burns*, 427 U.S. 347 (1976) and in *Branti v. Finkel*, 445 U.S. 507 (1980). Anyone who has supervised an employee knows there are two forms of punishment—each intended to bring behavior into desired conformity. Denying an employee a raise by denying promotion can have a far more devastating effect than a two day suspension. Yet under the Seventh Circuit's view only the latter would be actionable. *Pieczynski v. Duffy*, 875 F.2d 1331 (7th Cir. 1989). Both are forms of punishment. The key factor is that both are intended to bring behavior into conformity with desired conduct: financial "contributions" to and "volunteer" support of the favored party and affiliation with that party by voting in that party's primary. The employment system in this case is every bit as coercive as that in *Elrod*—even more so because these are civil service jobs.

The Seventh Circuit tried to distinguish this case from its prior decisions by claiming the denial of promotion and transfer was not directed against Petitioners Rutan and Taylor, but was incidental to favoring other persons. This

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[3] *Mueller v. Conlisk*, 429 F.2d 901 (7th Cir. 1970) (written reprimand); *McGill v. Board of Education of Pekin Elementary School*, 602 F.2d 774 (7th Cir. 1979) (transfer); *Knapp v. Whitaker, et al.*, 757 F.2d 826 (7th Cir. 1985) (transfer); *Egger v. Phillips*, 710 F.2d 292 (7th Cir. 1983) (transfer); *Hermes v. Hein*, 742 F.2d 350 (7th Cir. 1984) (denial of promotion; summary judgment on the facts for defendants affirmed but underlying premise was that the complaint stated a cause of action); *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982) (harassment after public employee had run for public office and made statements on public issues and had supported another candidate after she lost the primary).

Court rejected that argument in *Branti v. Finkel*, 445 U.S. 507 (1980). The Third Circuit followed *Branti* in *Bennis v. Gable*, 823 F.2d 723, 731 (3rd Cir. 1987) saying:

> The defendants also assert that *Elrod* and *Branti* should not be extended to cover plaintiffs who were not demoted for political opposition; but rather, were demoted simply to make room for political supporters. The problem with this assertion, however, is that an alternative view of a demotion to make positions available for political supporters is that the demotion thus reflects a failure to support. A citizen's right not to support a candidate is every bit as protected as his right to support one. See *Roberts v. United States Jaycees*, 468 U.S. 609, 623, 104 S.Ct. 3244, 3252-53, 82 L.Ed.2d 462 (1984).

and further concluded:

> Although *Pickering*, *Elrod*, and *Branti* each involved dismissals from employment, the rationale of each dealt with the constitutionality of action adversely affecting an interest in employment in retaliation for an exercise of first amendment rights. As we read those cases, *the constitutional violation is not in the harshness of the sanction applied, but in the imposition of any disciplinary action for the exercise of permissible free speech.* "The first amendment is implicated whenever a government employee is disciplined for his speech." *Waters v. Chaffin*, 684 F.2d 833, 837 n. 9 (11th Cir. 1982) (demotion and transfer). See *Robb v. City of Philadelphia*, 733 F.2d 286, 295 (3d Cir. 1984) (transfer and refusal to promote); *Czurlanis v. Albanese*, 721 F.2d 98 (3d Cir. 1983) (suspension). 823 F.2d at 731 (emphasis added).

See also, *Lieberman v. Reisman*, 857 F.2d 896 (2nd Cir. 1988).

The firings of the Plaintiffs in *Elrod v. Burns*, 427 U.S. 347 (1976), and in *Branti v. Finkel*, 445 U.S. 507 (1980),

can also be viewed as incidental to the employers' desire to hire their own people. That did not pass constitutional muster then and should not now.

The denial of promotion, transfer, and recall from layoff are forms of coercion.

The denial of a promotion to Petitioner Cynthia Rutan directly impacts the amount of money she will take home each month. Assume the promotion results in a $200.00 per month salary increase and could lead to further promotions. That could mean the difference between her child attending college or not. Increased salary directly affects other employment benefits: pension, Social Security benefits, disability payments, Worker's Compensation's benefits and life insurance coverage (through the state) for they are based on percentages of salary.

Also important is the effect on state government. The denial of her promotion affects the quality of government, for Cynthia Rutan was more qualified than those actually promoted. The same is true as to the denial of Petitioner Franklin Taylor's promotion.

The denial of the geographical transfer to Petitioner Franklin Taylor means countless hours a year on the road, away from family and other pursuits, driving to and from work and there is also the monetary impact: the cost of mileage and the wear and tear on his vehicle.

The coercion of the system is especially apparent in the case of Cross-Respondent Dan O'Brien. Close to the end of the two years in which he had the right to be recalled, the business administrator of the mental health center in which Dan O'Brien had worked told O'Brien he was going to be recalled. Two months later, the superintendent of that center told O'Brien the Governor's Office of Personnel rejected his recall. Subsequently, Dan O'Brien sub-

mitted to the system. He did what he had to do to get the support of Joe Sapp, the Republican County Chairman in Logan County. When he obtained that support, he was hired by the Department of Corrections. However, due to the rejection of his recall by the Governor's Office of Personnel, he still lost his twelve years of seniority and other benefits he had gained while with the Department of Mental Health and Developmental Disabilities.

This employment system is a phenomenal violation of the First Amendment. The State of Illinois is a major employer. With the exception of Standefer's position, these are civil service jobs, not the temporary type of position before this Court in *Elrod*. Thousands of Illinois citizens are being subjected to coercion—to change their political beliefs and demonstrate that change by acts of support of that in which they do not believe—in order to get promoted or transferred or hired.

The Respondents' acts toward these public employees are coercive and strike at the very heart of the First Amendment. They were intended to force the Petitioners and Cross-Respondents to vote in the Republican primary and to give money and other support to the Republican Party. The Respondents have denied Cynthia Rutan, Franklin Taylor, Ricky Standefer and Dan O'Brien important benefits of employment due to their political beliefs and affiliations.

B. Applicant For Public Employment

This Court has already extended full First Amendment protection to applicants. This Court has made no distinction between an employee and an applicant when First Amendment rights are at stake.

The explanation for not making any distinction between "applicant" First Amendment rights and "employee" First Amendment rights is found in *Perry v. Sinderman*, 408 U.S. 593 (1972), where the teacher may or may not have had re-employment rights. But assuming that teacher Sinderman had no employment rights the Court held:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. *It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460. Such interference with constitutional rights is impermissible.
>
> We have applied this general principle to denials of tax exemptions, *Speiser v. Randall, supra*, unemployment benefits, *Sherbert v. Verner*, 374 U.S. 398, 404-405, 83 S.Ct. 1790, 1794-1795, 10 L.Ed.2d 965, and welfare payments, *Shapiro v. Thompson*, 394 U.S. 618, 627, n. 6, 89 S.Ct. 1322, 1327 n. 6, 22 L.Ed.2d 600; *Graham v. Richardson*, 403 U.S. 365, 374, 91 S.Ct. 1848, 1853, 29 L.Ed.2d 534. But, most often, we have applied the principle to denials of public employment. *United Public Workers v. Mitchell*, 330 U.S. 75, 100, 67 S.Ct. 556, 569, 91 L.Ed. 754; *Wieman v. Updegraff*, 344 U.S. 183, 192, 73 S.Ct. 215, 219, 97 L.Ed. 216; *Shelton v. Tucker*, 364 U.S. 479, 485-486, 81 S.Ct. 247, 250-251, 5 L.Ed.2d 231; *Torcaso v. Watkins*, 367 U.S. 488, 495-496, 81 S.Ct. 1680, 1683-1684, 6 L.Ed.2d 982; *Cafeteria & Restaurant Workers*

v. McElroy, 367 U.S. 886, 894, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230; *Cramp v. Board of Public Instruction*, 368 U.S. 278, 288, 82 S.Ct. 275, 281, 7 L.Ed.2d 285; *Baggett v. Bullitt*, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377; *Elfbrandt v. Russell*, 384 U.S. 11, 17, 86 S.Ct. 1238, 1241, 16 L.Ed.2d 321; *Keyishian v. Board of Regents*, 385 U.S. 589, 605-606, 87 S.Ct. 675, 684-685, 17 L.Ed.2d 629; *Whitehall v. Elkins*, 389 U.S. 54, 88 S.Ct. 184, 19 L.Ed.2d 228; *United States v. Robel*, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508; *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811. We have applied the principles regardless of the public employee's contractual or other claim to a job. 408 U.S. at 597.

In *Torcaso v. Watkins*, 367 U.S. 488 (1961), Torcaso applied to become a notary public. He was rejected at the application stage because of his refusal to sign an oath due to religious beliefs. The highest court in Maryland had affirmed the denial of Torcaso's notary commission holding he was not compelled to believe or disbelieve; he simply could not hold public office unless he signed the oath. This Court struck down the oath requirement saying:

> *The fact, however, that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution.* This was settled by our holding in *Wieman v. Updegraff*, 344 U.S. 183, 73 S.Ct. 215, 219, 97 L.Ed. 216. 367 U.S. at 495-496. (emphasis added).

In *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), this Court struck down a loyalty oath requirement that applied to both applicants for employment and employees. The statutory and regulatory oath requirements sought "to *bar* employment," 385 U.S. at 609, for association which could not be prohibited consistent with the First Amendment.

The holding in *Perry v. Sindermann*, 408 U.S. 593 (1972), provided the precedent for this Court's holding in *Elrod v. Burns*, 427 U.S. 347 (1976). The plurality opinion relied upon two grounds: 1) the impact of patronage upon freedom of belief and association; 2) the imposition of an unconstitutional condition on the receipt of a public benefit as prohibited by *Perry v. Sinderman*, 408 U.S. 593 (1972). The concurring opinion did not comment upon the first ground but relied heavily upon the second.

Branti v. Finkel, 445 U.S. 507 (1980), can clearly be viewed as a hiring case for the whole purpose of the contemplated employment actions was to make way to hire those with the proper political sponsorship. If political hiring is constitutional, then *Branti* was decided incorrectly.

This Court also addressed the question of political hiring in *Branti* by way of footnote, 14, 445 U.S. at 519 and said:

> As the District Court observed at the end of its opinion, it is difficult to formulate any justification for tying either the selection or retention of an assistant public defender to his party affiliation:
>
> "Perhaps not squarely presented in this action, but deeply disturbing nonetheless, is the question of the propriety of political considerations emerging into the selection of attorneys to serve in the sensitive positions of Assistant Public Defenders. *By what rationale can it even be suggested that it is legitimate to consider, in the selection process, the politics of one who is to represent indigent defendants accused of crime?* No 'compelling state interest' can be served by insisting that those who represent such defendants publicly profess to be Democrats (or Republicans)." 457 F. Supp., at 1293, n. 13 (emphasis added).

It was clear from the comments of the dissenters in *Elrod* and in *Branti* that the Court believed that no real

distinction exists between the constitutional rights of those seeking employment and those already employed.

This Court most recently addressed an applicant's rights in the First Amendment context in *Hobbie v. Unemployment Appeals Com'n of Florida*, 480 U.S. 136 (1987), and in *Frazee v. Illinois Dept. of Employment Security*,-____ U.S. _ _ _, 109 S.Ct. 1514 (1989). In *Hobbie*, the State of Florida had denied Hobbie unemployment compensation benefits when she was fired because she refused to work on her Sabbath (she was a Seventh Day Adventist). Citing *Sherbert v. Verner*, 374 U.S. 398 (1963) and quoting *Thomas v. Review Board of the Indiana Employment Security Div.*, 450 U.S. 707 (1981), this Court said:

> *Where the state conditions receipt of an important benefit* upon conduct proscribed by a religious faith, *or where it denied such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.* 107 S.Ct. at 1049 (emphasis added by the Court).

Certain Courts of Appeal have also refused to draw a distinction between an applicant and an employee.

In *Clark v. Library of Congress*, 750 F.2d 89 (D.C. Cir. 1984), the plaintiff applied for forty positions at the Library of Congress. He claimed that he was denied those positions due to his affiliation with the Young Socialist Alliance. The District Court dismissed this claim. The D.C. Circuit reversed, holding:

> The district court's judgment on this claim must be reversed and the claim must be remanded for consideration of whether Clark met his burden of proof under the standard applicable to first amendment-based employment discrimination claims. 750 F.2d at 101.

In *Rosenthal v. Rizzo*, 555 F.2d 390 (3rd Cir. 1977), *cert. denied*, 434 U.S. 892 (1977) the Third Circuit found discharge and hiring comparable:

> In general, a state may not condition hiring or discharge of an employee in a way which infringes his right of political association. 555 F.2d at 392.

In *Cullen v. New York State Civil Service Commission*, 435 F.Supp. 546 (E.D.N.Y.), *appeal dismissed*, 566 F.2d 846 (2nd Cir. 1977), a case remarkably like the present case, the Court held that conditioning the hiring and promotion of persons for county jobs on political campaign contributions to local politicians was plainly unconstitutional. The Court recognized there was no right to public employment but held:

> . . . denial of employment or promotion may not be conditioned on the making of a financial contribution to a political party. 435 F.Supp. at 552.

In *Thorne v. City of El Segundo*, 726 F2d 459 (9th Cir. 1983), the Court held that inquiry into the private, off-duty personal life of an applicant for employment as a police officer violated her rights to privacy as guaranteed by the First Amendment. The Court said:

> A potential employee of the state may not be required to forego his or her constitutionally protected rights simply to gain the benefits of state employment. 726 F.2d at 469.

Petitioner Moore has been denied public employment due to his political beliefs and his political affiliation. He simply could not get the signature *required* to get a job, that of the Republican County Chairman. Should he now do what Cross-Respondent O'Brien was compelled to do—"volunteer' to work for the politically favored candidates, "contribute" money to the politically favored party and vote in that party's primary? Should the State be allowed

to require such a debasement and degradation of one's beliefs and ideals as a prerequisite to employment?

The implications of the Seventh Circuit's ruling goes far beyond Petitioner Moore. By outright dismissal of Moore's claim, the Seventh Circuit has said there is no system of political hiring that can ever be unconstitutional.

This effectively bars thousands from pursuing their chosen profession or employment for so many fields are exclusively or predominantly public employment: law enforcement, education, conservation, corrections, mental health, public aid, regulation of professions and regulation of certain industries. In certain geographical areas of Illinois, public employment is the major source of employment. For persons trained in these professions one cannot easily find a non-public job nor is it easy, in several parts of the state, to find a job in the private sector which pays a living wage.

Under these circumstances, conditioning employment itself upon adherence to certain political beliefs and affiliation is highly coercive and intended to bring behavior into desired conformity. It violates Petitioner Moore's First Amendment rights.

V. The Respondents Have Not Put Forth Any Compelling Or Overriding State Interest To Justify Infringement Of The Petitioners' And Cross-Respondents' First Amendment Rights.

At no time in this litigation have the Respondents put forth *any* state interest, let alone a compelling or overriding state interest, to justify the interference with the exercise of First Amendment rights.

The Seventh Circuit Court of Appeals suggested possible state interests when it referred to Justice Powell's

dissent in *Branti v. Finkel*, 445 U.S. 507 (1980). Those suggested state interests were rejected in both *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980). Ironically the dissent of Mr. Justice Powell in *Elrod* was based on the assumption that patronage hiring played a "limited role . . . in most government employment." 427 U.S. at 388. That assumption does not apply in the instant case. No position is filled by promotion, transfer, recall from lay-off or hire without the permission of the Governor's Office of Personnel.

In *Elrod v. Burns*, 427 U.S. 347 (1976), this Court recognized the history of patronage, but rejected the proposition that patronage promoted efficient and effective government saying:

> At all events, less drastic means for insuring government effectiveness and employee efficiency are available to the State. Specifically, employees may always be discharged for good cause, such as insubordination or poor job performance, when those basis in fact exist. 427 U.S. at 366.

The exemption of policy making positions certainly gives the incumbent administration the ability to govern as it wishes. Those exempt persons set the policy. Subordinate employees who do not carry out the set policy can be fired for insubordination. But it serves no state interest that a road equipment operator (Petitioner Taylor) or a garage worker (Cross-Respondent Standefer) or a dietary manager (Cross-Respondent O'Brien) be required to support a particular political party. All that serves the state is that they perform their assigned duties well.

In *Branti v. Finkel*, 445 U.S. 507 (1980), this Court noted that the state interest standard was not met:

> to the extent that employees were expected to perform extracurricular activities for the party, or were being rewarded for past services to the party. 445 U.S. at 517, fn. 12.

In the instant case, efficient and effective government would have been served by the promotion of Petitioners Rutan and Taylor for they were more qualified than those persons actually promoted. State interests would have been served by the Department of Mental Health and Developmental Disabilities not losing Cross-Respondent O'Brien's twelve years of experience in food service.

In *Elrod v. Burns*, 427 U.S. 347 (1976), this Court also rejected the argument that the patronage system strengthened the two party political system saying:

> And most indisputably, as we recognized at the outset, *patronage is a very effective inpediment to the associational and speech freedoms which are essential to a meaningful system of democratic government. Thus, if patronage contributes at all to the elective process, that contribution is diminished by the practice's impairment of the same.* Indeed, unlike the gain to representative government provided by the Hatch Act in *CSC v. Letter Carriers, supra*, and *United Public Workers v. Mitchell, supra*, the gain to representative government provided by the practice of patronage, if any, would be insufficient to justify its sacrifice of First Amendment rights. 427 U.S. at 369-370. (emphasis added)

In this case the employment system strengthens the incumbent party and uses two million dollars of tax money to do it.

This Court in *Branti v. Finkel*, 445 U.S. 507 (1980) further noted that:

> Government funds, which are collected from taxpayers of all parties on a nonpolitical basis cannot be expended for the benefit of one political party simply because that party has control of the government. 445 U.S. at 517, fn. 12.

But that is exactly what has happened in this case.

In *Elrod v. Burns*, 427 U.S. 347 (1976), this Court cautioned against confusing partisan interests with state interests. Partisan loyalty must not be confused with governmental loyalty. The Plaintiffs can be patriots loyal to the concept of effective and efficient government to serve the people of Illinois. That patriotism is not to be confused with the requirement of total loyalty to one political party or one set of political candidates. Partisan loyalty and governmental loyalty merging into one entity from the basis of the totalitarian state.

How ironic that in the instant case the Respondents have used the employment system to coerce the merger of partisan loyalty with loyalty to the state. In essence, the Respondents require a loyalty oath in order to be promoted, transferred, recalled from lay-off or hired. (See Sangamon County Republican Party promotion application form, p. 7 *supra*). The Petitioners and Cross-Respondents must vote in the Republican primary. They must contribute to the party and they must work for the endorsed party candidates. This is not just the saying of a few words under oath. Affirmative acts must be performed—acts that run counter to the Petitioners' and Cross-Respondents' political beliefs. The consequences of not conforming is adverse employment action.

The State of Illinois has expressed its state interest when it enacted into law a merit system of employment. All employment transactions in the instant case, with the

exception of Cross-Respondent Standefer, fall under the civil service system established by the Personnel Code, *Ill. Rev. Stat.*, Ch. 127, Sec. 63b101. The very purpose of that civil service system is set forth in the statute itself:

> 63b102. Purpose
>
> Sec. 2. Purpose. The purpose of the Personnel Code is to establish for the government of the State of Illinois a system of personnel administration under the Governor, *based on merit principles and scientific methods*. (emphasis added).

"Merit principles" of personnel administration has been defined and interpreted by Illinois Courts in the following manner:

> Such principles are few and relatively well known. Cardinal among them is that the purpose of civil service laws is to provide a method which ensures *competent service* for governmental bodies, *free of the spoils system. Fahey v. Cook County Police Department Merit Board*, 21 Ill. App. 3d 579, 315 N.E.2d 573, 578 (1st Dist., 1974). (emphasis added)

See also *Hacker v. Myers*, 33 Ill. App. 2d 322, 179 N.E. 2d 404 (1st Dist. 1961); *Burke v. Civil Service Commission*, 41 Ill. App. 2d 446, 190 N.E. 2d 841 (3rd Dist. 1963). The state has identified its interests in a merit employment system free of the spoils system. State interests articulated through the enactment of statute simply do not include the insidious patronage system operated by Respondents.

The patronage employment system serves the interests of the Republican Party and its candidates, but the interests of the Republican Party and its candidates are not the interests of the State. There are no overriding or compelling state interests to justify the interference with First Amendment rights that exist in this case. Because of this Petitioners and Cross-Respondents need not go on to the

third aspect of traditional First Amendment case analysis, namely, that the interference with the right must be *clearly* defined in the least restrictive terms possible. But Petitioners and Cross-Respondents do note it is not clearly defined as to how much of a "contribution" will get Cynthia Rutan the desired promotion or how much "volunteer" work will get Franklin Taylor the transfer to his resident county. If there is an overriding state interest then the Respondents must clearly articulate what is required to obtain a promotion, a transfer, recall from lay-off or a job. This focus demonstrates the inherent unconstitutionality of the system. Imagine the Department of Corrections posting a vacant position and including in the posting that a contribution of five hundred dollars to a particular party is necessary to get the job, or, in the alternative, one hundred hours of work canvassing the precinct in the last primary election. But, *sub silencio*, that is what is happening in Illinois.

VI. This Court Must Not Relegate First Amendment Rights To A Position Vastly Inferior To Rights Guaranteed Under Other Amendments To The United States Constitution.

Circuit Courts of Appeal have never applied a constructive discharge standard to a person denied an employment benefit on the basis of race or sex in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. *Riordan v. Kempiners, et al.*, 831 F.2d 690 (7th Cir. 1987) (salary difference of state employees—sex); *Hamilton v. Rodgers*, 791 F.2d 439 (5th Cir. 1986) (harassment and retaliation of a fire department employee—race).

The Courts of Appeal have repeatedly recognized a cause of action brought under 42 *United States Code* 1983

for failure to hire due to race or sex. In *Van Houdnos v. Evans, et al.*, 807 F.2d 648 (7th Cir. 1986), the Seventh Circuit reversed a directed verdict for defendant and reinstated a jury verdict for the plaintiff who was denied a position at the Illinois State Museum due to her sex. In *Hill v. Metropolitan Atlanta Rapid Transit Authority*, 841 F.2d 1533 (11th Cir. 1988), the Court reversed the District Court's summary judgment for the defendant as to certain individual applicants' claims that they were denied employment due to their race. In *Briggs v. Anderson*, 796 F.2d 1009 (8th Cir. 1986), the Court reversed the dismissal of the claims of certain applicants for public employment and the dismissal of claims of public employees denied promotion due to race.

There is no rational basis to relegate the right to freedom of speech and freedom of association to an inferior position vis-a-vis the right to be free from discrimination based upon race or sex in employment matters. Decades before blacks were considered persons and over a hundred years before women were granted the right to vote, this nation established the right to freedom of speech and freedom of association. Those rights form the foundation of representative democracy. Those rights must not be relegated to a position inferior to Fourteenth Amendment.

This Court has repeatedly struck down other state limitations on the granting of benefits when those limitations violate other constitutional provisions. In *Shapiro v. Thompson*, 394 U.S. 618 (1969), this Court struck down a one year residency requirement for the obtaining of state welfare benefits holding that if the purpose of the law was to chill assertion of constitutional rights it was patently unconstitutional. In *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), this Court struck down a New Mexico statute denying a tax exemption to Vietnam veterans who resided in that state after May 8, 1976, on

the grounds the state may not favor established residents ("its own") over new residents. This Court also struck down a New York veterans' preference hiring statute when that state limited the preference to veterans who had served in the armed forces while a resident of that state. *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986).

With all due respect for these other rights guaranteed by the Amendments to the Constitution, the First Amendment rights form the underpinning of our system of government. In this year, the two hundredth anniversary of the Bill of Rights, this Court should not relegate First Amendment rights to a position inferior to those other rights.

> Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1956).

The whole concept of freedom of association negates the coupling of denial of an employment benefit with disapproval of political beliefs and affiliation or with coercion to change those beliefs and association.

CONCLUSION

Petitioners and Cross-Respondents have the right to hold particular political beliefs and to associate politically according to those beliefs without experiencing denial of important aspects of employment.

Petitioners and Cross-Respondents pray that this Court hold each Petitioner and Cross-Respondent has stated a

cause of action and apply the rule of law set forth in *Elrod v. Burns*, 427 U.S. 347 (1976) and in *Branti v. Finkel*, 445 U.S. 507 (1980), namely, that the Respondents cannot deprive Petitioners and Cross-Respondents promotion, transfer, recall from lay-off and employment itself on the basis of political belief and association.

Petitioners and Cross-Respondents pray this Court remand this case for full hearing on the Petitioners' and Cross-Respondents' claims.

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